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No. 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

CHARLIE BROYLES, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL COAL ASSOCIATION, THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, THE PITTSTON COAL GROUP, THE BARNES & TUCKER COMPANY, THE ISLAND CREEK COAL COMPANY, THE CONSOLIDATION COAL COMPANY, THE OLD REPUBLIC INSURANCE COMPANY, AND THE PENNSYLVANIA NATIONAL INSURANCE GROUP

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Amici curiae,[1] respectfully sumit that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit filed in this proceeding on July 31, 1987 should be held in abeyance pending the disposition of *Pittston Coal Group* v. *Sebben,* Nos. 87-821 and 87-827.

INTEREST OF AMICI CURIAE

The National Coal Association (hereinafter "NCA") is a trade association comprising approximately 200 members.

1. In accordance with Rule 36.1, the written consent of the Solicitor General and Charlie Broyles, *et al.* are submitted herewith.

NCA members are directly or indirectly responsible for about 90 percent of the nation's coal production. In addition to coal producing companies, NCA's membership includes coal brokers, equipment suppliers, coal transporters, consultants, electric utilities, and resource developers.

The American Insurance Association (hereinafter "AIA") is an independent, not-for-profit insurance industry trade association whose membership includes approximately 200 property-casualty insurance companies and their subsidiaries. AIA provides a variety of services to its members and, from time to time, represents their collective interests in the course of litigation of special significance.

The National Council on Compensation Insurance (hereinafter "NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes over seven hundred insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout the United States. In thirty-five states, including most major coal mining states, NCCI proposes and administers premium rates and rating plans for workers' compensation insurance. NCCI also manages the National Workers' Compensation Reinsurance Pool (hereinafter the "Pool"). The Pool reinsures several categories of risk that arise under the federal Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1986) (hereinafter the "Act"). The Pool is the only commercial insuring vehicle available to small and high risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1987), or to purchase direct coverage from an insurance carrier. NCCI's members and many AIA members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, from 15-20% of all federal claim liabilities are insured or reinsured by the Pool.

The Pittston Coal Group, the Barnes & Tucker Company, the Island Creek Coal Company, the Consolidation Coal Company, the Old Republic Insurance Company, and the Pennsylvania National Insurance Group[2] are the petitioners in *Pittston Coal Group* v. *Sebben*, *cert. granted*, 56 U.S.L.W. 3555 (U.S. Feb. 22, 1987) (No. 87-821). The question presented in the Government's petition for certiorari here is among those presented by the petitioners in *Pittston Coal Group*. Pittston and its co-petitioners are individual mine operators and commercial insurance carriers, each of which has substantial liability for claims arising under the Act.

Mine operators and their insurers directly or indirectly bear the burden for the payment of all benefits awarded under the Department of Labor administered portions of the Act, 30 U.S.C. §§ 932, 933, 934, the cost of administration of the black lung program, 30 U.S.C. § 934(a)(5), and the payment of interest on the debt accrued by the Black Lung Disability Trust Fund, 30 U.S.C. § 934(a)(4).[3]

Black lung claims filed with the Secretary of Labor prior to April 1, 1980 were and continue to be subject to adjudication under an eligibility rule called the "interim presumption." The Secretary of Labor's interim presumption is published at 20 C.F.R. § 727.203 (1987). Black lung claims adjudicated by the Social Security Administration (hereinafter "SSA") were considered under another version of the interim presumption published at 20 C.F.R. § 410.490 (1987). The two presumptions differ in certain respects, and some (but not all) claimants will be

2. The Pittston Coal Group is a wholly-owned subsidiary of the Pittston Companies; the Island Creek Coal Company is a wholly-owned subsidiary of the Occidental Petroleum Corporation; the Consolidation Coal Company is a wholly-owned subsidiary of the E.I. duPont de Nemours & Company; and the Old Republic Insurance Company is a wholly-owned subsidiary of the Old Republic International Corporation. The Barnes & Tucker Company and the Pennsylvania National Insurance Group are independent entities.

3. The insurance industry parties are responsible for the payment of incurred losses on individual claims only. The mine owners are responsible for the payment of individual claims not covered by insurance and for funding the Black Lung Disability Trust Fund, 26 U.S.C. §§ 4121, 9501.

more likely to obtain an award of benefits under the SSA rule. Several circuits, including the Fourth Circuit in this case, have held that the SSA rule must apply in Labor Department claims if such application produces a more favorable result for the claimant. *See Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987).

Section 410.490 differs from section 727.203 in two significant respects: (1) Section 410.490 may be invoked by a miner, with fewer than ten years of coal mine exposure, where chest x-rays are positive for black lung disease, while section 727.203 requires ten years of mine work for its invocation; and (2) For a miner who has died or is permanently disabled from any cause, occupational or not, section 410.490 may be irrebuttable. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 329. It also appears to be irrebuttable even if the miner does not have black lung disease. *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1184 (7th Cir. 1987). Section 727.203 is rebuttable by proof that the miner does not have black lung disease or was not disabled by a health impairment related to coal dust exposure. 20 C.F.R. § 727.203(b).

Amici believe that the decision of the Fourth Circuit, if applied to still pending claims[4] subject to adjudication under the interim presumption, effectively deprives amici of fundamental defensive rights to contest non-meritorious claims. Further, the decision of the Fourth Circuit will, without doubt, require the payment of benefits directly or indirectly by amici to several thousand claimants not properly within the contemplation of the Act, at a cost averaging from $118,315.88 to $185,659.69 per claim. U.S. Department of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981). This liability is both unfunded and unanticipated. The imposition of this liability on

4. In *Mullins Coal Co. Inc. of Virginia* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 430 (1987), this Court observed that there are about 10,000 still pending claims to be decided under the interim presumption. While the volume has probably decreased to some extent since briefing in *Mullins*, the number of claims in this category remains significant.

the affected industries will disrupt federal benefit funding mechanisms well into the twenty-first century, and is not and never will be affordable for many smaller mine owners and insurers.

Liability for the payment of benefits to miners who do not have black lung disease or are not disabled by it, should not be properly imposed on amici in the guise of a black lung disability compensation benefit. Congress did not intend this result and the Secretary of Labor's regulations are properly designed to preclude it. The Fourth Circuit's decision to the contrary departs from reason and is a matter of immediate and substantial concern to amici.

ARGUMENT

On February 22, 1988, this Court granted the petitions for certiorari in and consolidated *Pittston Coal Group* v. *Sebben* and *McLaughlin* v. *Sebben*, 56 U.S.L.W. 3555 (U.S. Feb. 22, 1987) (Nos. 87-821 and 87-827). Among the questions presented in *Pittston Coal Group* is whether the Secretary of Labor's interim presumption, to the extent that it differs from section 410.490, is consistent with the Act. A resolution of this question in *Pittston Coal Group* disposes of the instant case.[5] On the assumption that

5. *Pittston Coal Group* addresses the retroactive application of section 410.490 to previously denied and closed cases. The instant case addresses application of section 410.490 in pending claims. This distinction should have no direct relevance to a resolution of the question. It is noted that there are important issues presented in *Pittston Coal Group* that are, at least hypothetically, dispositive of *Pittston* but not this case; however, from amici's perspective, *Pittston* is the preferred vehicle because only it affords the Court a setting within which the underlying problem may be resolved in all of its dimensions and only it affords all affected industries the opportunity to fully participate as parties and frame the issues in this matter of such substantial importance. Until this Court accepted *Pittston Coal Group* for plenary review, mine operators and their insurers had been deprived of the right to be heard in a timely way on the section 410.490 question.

Two additional petitions for certiorari raising the section 410.490 question have been filed in *Director, Office of Workers' Compensation Programs* v. *Kyle*, 56 U.S.L.W. 3463 (U.S. Dec. 21, 1987) (No. 87-1045) and *National Council on Compensation Insurance* v. *Kyle*, 56 U.S.L.W. 3484 (U.S. Dec. 21, 1987) (No. 87-1065). The petitions for certiorari in *Kyle* present potential problems that this Court need not address as their resolution will not advance the orderly disposition of the key issues presented. Otherwise, *Kyle* replicates the instant case in most respects, and it too should be resolved by *Pittston Coal Group*.

Pittston Coal Group should resolve the section 410.490 issue, amici suggest that the convenience of the Court and the several parties involved is best served by holding this petition for certiorari in abeyance pending resolution of *Pittston Coal Group*. In the alternative, amici urge the Court to grant certiorari in this case.

The merits of the petition in this case, are fully detailed by the Solicitor General and by Pittston and its co-petitioners in *Pittston Coal Group*. Their reiteration here serves no purpose.

CONCLUSION

Amici ask the Court to hold the petition for certiorari in abeyance pending the disposition of *Pittston Coal Group*.

Respectfully submitted,

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